IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED VACCINES, INC.,

OPINION and ORDER

Plaintiff,

05-C-604-C

v.

DIAMOND ANIMAL HEALTH, INC.
and HESKA CORPORATION,

Defendants.

- -

In May 2003, plaintiff United Vaccines, Inc. and defendant Diamond Animal Health, Inc. entered into an agreement whereby defendant would manufacture animal vaccine products for plaintiff. Things did not go as planned, however. Defendant Diamond was unable to manufacture all of the vaccine products plaintiff ordered and plaintiff was late repeatedly in paying defendant for the products it did make. Eventually, plaintiff filed suit, alleging breach of contract and a variety of other state law claims. Jurisdiction is present under the diversity statute, 28 U.S.C. § 1332(a)(1).

Presently before the court are three motions: (1) a motion for summary judgment filed by defendants Diamond and Heska seeking dismissal of all of plaintiff's claims;

plaintiff's motion for partial summary judgment; (2) a motion for partial summary judgment filed by plaintiff; and (3) defendant Diamond's motion for summary judgment with respect to its breach of contract counterclaim concerning two batches of vaccine sent to plaintiff in December 2004.

The motion filed by defendants Diamond and Heska will be granted with respect to plaintiff's intentional interference with existing contracts claim because plaintiff has failed to adduce any factual evidence to support this claim. It will be granted with respect to plaintiff's intentional misrepresentation claim because plaintiff had only the remedy of rescission available and it waited too long to rescind the manufacturing agreement. The motion will be granted with respect to plaintiff's breach of warranty claim because plaintiff has abandoned any claim of breach of implied warranty and the parties' agreement forecloses any possibility of money damages for breach of an express warranty. Finally, the motion will be denied as to plaintiff's breach of contract claim because genuine issues of fact exist that prevent the court from finding that plaintiff's late payments meet the standard of "material default" set out in the agreement. Plaintiff's motion for partial summary judgment will be denied because the record does not establish, as a matter of law, that the market prices that will be used to determine plaintiff's damages are the same as plaintiff's retail prices. Defendant Diamond's motion for summary judgment with respect to its breach of contract counterclaim will be denied because numerous gaps in the factual record prevent the court

from concluding, as a matter of law, that plaintiff breached the agreement and is liable to defendant Diamond in the amount defendant suggests.

The parties' proposed findings of fact omit many details concerning the parties' course of performance under the manufacturing agreement. For example, the parties have not identified the dates on which defendant delivered incomplete orders of vaccines and on which plaintiff became delinquent in its payment obligations. They have not specified which vaccines were not delivered completely on which dates or by how much defendant's production of each vaccine fell short of plaintiff's orders. They have not constructed a chronology of these events that would have helped the court analyze their breach of contract claims. It should not come as a surprise to the parties that a trial on these claims is necessary.

From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff United Vaccines, Inc. is a corporation formed under the laws of Indiana with its principal place of business in Madison, Wisconsin. Defendant Diamond Animal Health, Inc. is a corporation organized under the laws of Iowa with its principal place of business in

Des Moines, Iowa. Defendant Heska Corporation is a corporation formed under the laws of Delaware with its principal place of business in Loveland, Colorado. Defendant Diamond is a wholly owned subsidiary of defendant Heska. Plaintiff and defendant Diamond are vaccine manufacturers. Plaintiff markets its mink distemper vaccine under the name "Distemink."

B. The Animal Vaccine Industry

A company cannot sell animal vaccine products in North America or Europe unless it obtains a license from the appropriate governmental authority. Other than plaintiff, the only company licensed to sell mink distemper vaccine in the United States is Schering-Plough Animal Health/ASL. In Europe, the only companies licensed to sell the vaccine are plaintiff and Nordvacc Lakemedel AB. The only manufacturers of "AD Antigen" are plaintiff and a Danish fur breeder organization. Schering-Plough, Nordvacc and the Danish company are plaintiff's direct competitors.

Normally, vaccine products are sold in North America by manufacturers directly to mink ranchers or cooperatives. In Europe, the sales process is more complicated. Products are sold to a "Marketing Authority Holder" and then pass through multiple levels of distribution before reaching end users.

Vaccine product containing Distemink or "BT Pool" must be delivered to customers

by June or July because newborn animals reach the age for vaccination during those months. Plaintiff can deliver vaccine product to its customers only if it receives the product by May at the latest. Mink vaccine takes several months to manufacture and the finished product must satisfy applicable regulatory standards for purity and potency.

C. Commercial Relationship Between United and Diamond

At some point, plaintiff was forced to abandon a manufacturing facility in Wisconsin so the state could construct a highway. After that, plaintiff was no longer able to produce specific materials needed to create vaccines. According to plaintiff's general manager, Robert Norberg, the only other companies that could make plaintiff's products were its direct competitors and they would not provide vaccine products to plaintiff for prices similar to those agreed to by defendant. As a result, plaintiff decided to outsource parts of its production operation. In 2002, plaintiff began ordering products from defendant Diamond because it believed defendant was the only producer willing and able to produce the vaccine products it needed.

The process plaintiff uses to make its vaccines is unique in the industry; plaintiff and its approved subcontractors are the only entities that can manufacture vaccines according to plaintiff's product specifications. Because of the nature of the permission granted by the United States Department of Agriculture to defendant Diamond to manufacture "the

products" and because defendant Diamond did not have experience in manufacturing the products plaintiff required, plaintiff was responsible for providing defendant with "outlines of production," or recipes for the products. In addition, plaintiff's personnel had to be present at defendant Diamond's facilities to oversee the performance of all critical steps for the manufacture of each product until defendant received the required license for each product from the Department of Agriculture. (Defendant Diamond did not receive the license for Distemink until March 15, 2005, and produced only two lots of it after receiving the license.)

D. Manufacturing Agreement

In May 2003, defendant Diamond sought to have the parties' arrangement formalized so that it could predict future work and income. That month, the parties signed a manufacturing agreement, which was to last from January 1, 2003 to December 31, 2009. Defendant Diamond promised to manufacture and sell various vaccine products to plaintiff including AD Antigen Pool, PT Pool and Distemink. Defendant agreed to provide plaintiff with Distemink for $0.068 for each dose if defendant supplied the bottles, stoppers and seals or $0.065 for each dose if plaintiff supplied bottles, stoppers and seals. Defendant agreed to provide AD Antigen for $0.045 for each dose and BT Pool for $0.023 for each dose. Plaintiff would order product by submitting purchase orders and was required to pay only

for product that met its specifications. Among the agreement's provisions are the following:

> 3.3 Specifications. Diamond and [plaintiff] agree that the Products will be manufactured in accordance with the Specifications and regulations applicable to Diamond in the Distribution Area, subject to the provisions of Section 8. The Specifications may be changed at any time by mutual agreement of the parties, subject to applicable regulatory notices and approvals. Any disagreement concerning revisions to the Specifications shall be resolved by mutual discussion and negotiation.
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> 4.5 Payment Terms. Diamond shall notify [plaintiff] of the date when Products are ready for pick up by [plaintiff]. Diamond shall invoice the [plaintiff] for Products on the date Diamond notifies [plaintiff] that the Products are ready for pick up. Payment terms shall be net 30 days from the date of each such invoice, provided that the Products pass [plaintiff]'s inspection as provided in Section 4.6 below and final USDA & EU testing. Diamond shall be entitled to place [plaintiff] on shipment hold and otherwise suspend performance under this Agreement if [plaintiff] shall be materially late or in material default of its payment obligations.
>
> 4.6 Inspection of Products by [Plaintiff]. [Plaintiff] shall be entitled to inspect and test samples of the Product within sixty (60) business days after receipt and any non-conformance with the Specifications established by [plaintiff] shall be promptly reported to Diamond. In addition, [plaintiff] may, at its election, perform any in-process or final product testing as it deems appropriate, with Diamond agreeing to do so after [plaintiff]'s emergency authorization expires. Diamond will retain appropriate batch samples for later testing in the event a problem with a batch is identified. The Specifications identify the expected testing of the Products by the parties. In the event that any testing of Products by [plaintiff] indicates a non-conformity with Specifications and testing by Diamond does not indicate a non-conformity, the test results of [plaintiff] shall control over any test results provided by Diamond.
>
> If any non-conformities with Specifications are established prior to the time [plaintiff] is obligated to pay for the Products, then [plaintiff] shall not be obligated to pay for the Products and the non-conforming Products shall

> become the property of and be returned to Diamond at Diamond's expense, with Diamond reprocessing or disposing of such Products at its own expense according to all appropriate regulations. If the non-conformity is established after payment, the provisions of Section 8.3 shall be deemed to apply.

In § 5.1, the parties acknowledged that "the delivery of the Products is anticipated to occur between March and December during each calendar year." In addition, defendant Diamond made several warranties in the agreement. In § 8.1(a), defendant warranted that "the Products delivered to [plaintiff] hereunder shall conform to the Specifications and shall be free from material defects in workmanship and materials through their respective labeled expiration dates." In § 8.1(c), defendant warranted that it had "the requisite experience, knowledge and expertise, suitable facilities and qualified personnel to manufacture the Products and to perform its other obligations" in the agreement "in a sound, safe, lawful and workmanlike manner." Section 8.3, entitled "Customer Remedy for Breach of Warranty," provides as follows:

> In the event it is determined that any Product shipped by Diamond hereunder breaches Diamond's warranty under Section 8.1(a), then, at [plaintiff]'s option, (i) Diamond shall replace the non-conforming Product with substitute conforming Product within the time agreed to by both parties, or (ii) Diamond shall be relieved of any obligation to deliver any conforming Product and Diamond shall either credit against future purchases by [plaintiff] the purchase price and shipping costs of such non-conforming Product paid by [plaintiff] or refund the price and such costs to [plaintiff]. The non-conforming Product shall become the property of and be returned to Diamond at Diamond's expense. Diamond shall reprocess or dispose of such Product at its own expense according to all appropriate regulations.

Section 8.4, entitled "Product Recall," states as follows:

> Diamond shall substitute Product at no cost to [plaintiff] to complete any Product recall required under applicable regulations by subsequent determination that the Product was not produced in accordance with Specifications when released to [plaintiff] or was not produced in compliance with applicable regulations when released to [plaintiff]. Diamond shall be responsible for [plaintiff]'s reasonable costs and expenses in connection with any such Product recall, unless proper potency testing by [plaintiff] prior to sale of Products would have disclosed such nonconformity. [Plaintiff] shall be responsible for all other recalls.

Section 8.6, entitled "Exclusive Remedy," provides as follows:

> THE REMEDIES DESCRIBED IN SECTIONS 4.6, 8.3 AND 8.4 ARE EXCLUSIVE AND IN LIEU OF ANY OTHER REMEDY [plaintiff] WOULD OTHERWISE HAVE AGAINST DIAMOND WITH RESPECT TO DEFECTIVE PRODUCTS OR ANY BREACH OF DIAMOND'S LIMITED WARRANTY UNDER SECTION 8.1(a) OF THIS AGREEMENT; PROVIDED, THAT THIS SECTION SHALL NOT LIMIT DIAMOND'S INDEMNITY OBLIGATION SET FORTH IN SECTION 11 WITH RESPECT TO THIRD PARTY CLAIMS.

Section 8.7(b) provides as follows:

> SUBJECT TO EACH PARTY'S INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 11 HEREOF WITH RESPECT TO THIRD PARTY CLAIMS, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR ANY THIRD PARTY FOR LOST PROFITS, LOSS OF GOODWILL, OR ANY SPECIAL, INDIRECT, CONSEQUENTIAL OR INCIDENTAL DAMAGES, HOWEVER CAUSES, ARISING UNDER ANY THEORY OF LIABILITY. THIS LIMITATION SHALL APPLY EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

Section 7.2 describes the parties' ability to terminate the agreement in the event the other

party breached its obligations:

> Subject to the provisions of Sections 3.3 and 12.2, if either party shall breach any material obligation required under this Agreement, the other party may give written notice of its intention to terminate this Agreement, describing in reasonable detail the breach. If the breaching party fails to remedy such material breach within thirty (30) days (ninety (90) days in the case of any failure by Diamond to delivery any Product) following such written notice, or if such breach is not capable of cure within such thirty (30)-day or ninety (90)-day period, as the case may be, and the breaching party fails to commence cure procedures within such thirty (30)-day or ninety (90)-day period and diligently prosecute such procedures until the breach is cured, then the non-breaching party may, in addition to all other remedies available at law or in equity, terminate this Agreement immediately upon written notice.

Section 12.4 provides that the "validity, interpretation and performance of this Agreement shall be governed and construed in accordance with the internal laws of the State of Iowa." Finally, § 12.6 states that no

> modification or waiver of any provision of this Agreement shall be effective unless the modification or waiver is made in writing and signed by the party sought to be charged. . . . No course of dealing between Diamond and [plaintiff] or delay or failure to exercise any rights hereunder shall operate as a waiver of such rights or preclude the exercise of any other rights hereunder.

The have been no written modifications to the agreement.

E. Course of Performance Under the Agreement

After defendant Diamond and plaintiff executed the agreement, defendant became plaintiff's only source for the products listed in the agreement. Despite its best efforts,

defendant Diamond had problems manufacturing some of the products with sufficient titer, or potency, to meet plaintiff's specifications. As a result, defendant Diamond was unable to fill all of plaintiff's purchase orders in a timely manner. The problems occurred even though defendant Diamond followed plaintiff's outlines of production and had plaintiff's employees supervising the production. Defendant excessively freeze-dried some vaccine product and attempted to produce vaccine product on a larger scale than plaintiff had attempted. Despite these problems, defendant tried repeatedly to make product for plaintiff and it was able to make some of the products in a timely manner and in sufficient quantities and potency. When defendant Diamond failed to deliver the vaccine products on time, plaintiff had no other source from which it could obtain the products on terms and prices similar to those in the manufacturing agreement.

Defendant Diamond attempted to work with plaintiff to change the process for making plaintiff's products and to change the specifications to resolve the problems with production. Defendant Heska was not involved in these efforts. Plaintiff was aware of the problems as early as 2003 but continued to issue purchase orders to defendant Diamond in 2003, 2004 and 2005. (Plaintiff did not realize until "later" that defendant's inability to make timely deliveries of product would be a chronic problem.) Defendant Diamond failed to deliver product that plaintiff had ordered on multiple occasions but never destroyed product that met plaintiff's specifications. It withheld product only once because plaintiff

was behind on its payments.

Plaintiff never sought a refund or credit for product that did not meet its specifications. On several occasions, plaintiff accepted and paid for product that did not meet its specifications, including MEV type 2 lot 4074; MEV type 1 lot 410; Pseudomonas PA5G-485 lot B37628; and Distemink serial DH03A. Instead of returning these products to defendant Diamond, plaintiff took steps to correct these products, bringing them in line with specifications because that course of action was faster and involved less governmental interaction. Plaintiff had the experience, knowledge and equipment to make the appropriate corrections and the corrections presented less risk to the product when done with normal processing. Plaintiff never returned any product that met its specifications or other benefit received from defendant Diamond in an attempt to cancel the manufacturing agreement. Also, it never terminated the agreement by providing written notice to Dr. Michael J. McGinley.

For its part, plaintiff rarely met the payment provisions in the agreement. Usually, plaintiff paid invoices between 45 and 60 days after receipt of product. Plaintiff received a few communications from defendant Diamond's controller, Randy Frisch, inquiring when invoices would be paid. Normally, Frisch would send an email or fax regarding the status of plaintiff's account and plaintiff would fax him a proposed payment plan. Usually, Frisch agreed to the proposed payment plan; when he did not, the parties formulated a plan

acceptable to both. Defendant never placed plaintiff on a "shipment hold." At the end of 2004, defendant Diamond requested that plaintiff pay all open invoices before receiving further deliveries of product. Plaintiff wired payment on December 28, 2004 and defendant Diamond shipped products that same day.

In 2004, plaintiff charged an average of $0.1061 for each dose of Distemink, $0.1223 for each dose of AD Antigen and $0.1162 for each dose of BT Pool.

F. December 2004 Shipment of C. Bot

The products shipped by defendant Diamond on December 28, 2004 included two batches of a vaccine product called C. bot. The batches were identified as B37693 and B37704. The invoice for them was $328,777.46. (The parties dispute how many doses were contained in the batches.) Plaintiff did not test the batches within 60 days of receiving them. At some point, plaintiff sent defendant Diamond a check in the amount of $168,636 for the two batches. (The parties do not indicate exactly when the check was sent.) Initially, plaintiff did not explain the discrepancy between the amount of the invoice and the check. On October 31, 2005, after filing this lawsuit, plaintiff recalled the check and issued a second check in the same amount. In a letter accompanying the second check, plaintiff explained that the discrepancy was the result of plaintiff's testing of the batches. Although the second check was for only one-half of the invoiced amount, plaintiff stated that the

check was payment in full. Defendant Diamond has not negotiated the check.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, the court must view all facts and draw all inferences from those facts in the light most favorable to the non-moving party. Schuster v. Lucent Technologies, Inc., 327 F.3d 569, 573 (7th Cir. 2003). However, the non-moving party may not simply rest on its allegations; rather, it must come forward with specific facts that would support a jury's verdict in its favor. Van Diest Supply Co. v. Shelby County State Bank, 425 F.3d 437, 439 (7th Cir. 2005).

B. Procedural Background

A brief discussion of the procedural posture of this case will place in context the arguments advanced by the parties in support of and in opposition to the summary judgment motions. In an order dated January 12, 2006, I granted defendants' motion to dismiss in part and denied it in part. United Vaccines, Inc. v. Diamond Animal Health, Inc., 409 F.

Supp. 2d 1083 (W.D. Wis. 2006). I dismissed plaintiff's negligent misrepresentation, strict responsibility and intentional misrepresentation tort claims because they were barred by the economic loss doctrine. Id. at 1093. I allowed plaintiff to go forward on an intentional misrepresentation contract claim but limited plaintiff's remedies to rescission or damages allowable under the contract. Id. at 1095. I denied defendants' motion to dismiss plaintiff's breach of contract and breach of warranty claims against defendant Heska, id. at 1096, and rejected plaintiff's argument that it could pursue its intentional misrepresentation claim for rescission of the manufacturing agreement and a claim for breach of an implied contract that arose as a result of the parties' conduct after the manufacturing agreement was signed. Id. at 1097. Finally, I ruled that if plaintiff elected to affirm the contract and seek damages, the terms of the manufacturing agreement precluded it from obtaining damages for lost sales and lost customers. Id.

On January 25, 2006, defendant Diamond filed an amended counterclaim in which it asserted various counterclaims against plaintiff: breach of contract; anticipatory breach of contract; breach of the duty of good faith and fair dealing; and breach of contract by fraudulent inducement. Defendant Diamond seeks summary judgment with respect to its breach of contract counterclaim concerning the batches of C. bot. it shipped to plaintiff in December 2004. Defendants Diamond and Heska seek dismissal of plaintiff's remaining claims: intentional misrepresentation; breach of contract; breach of warranty; and intentional

interference with existing contracts. In its motion for partial summary judgment, plaintiff seeks a declaration "that the applicable market to be used to determine the market price under Iowa Code § 554.2713 is the market into which United would have resold any vaccines delivered" by defendant Diamond. Plt.'s Br. in Support of Mot. for Part. Summ. J., dkt. #37, at 1.

C. Defendants' Motion for Summary Judgment

1. Intentional interference with existing contracts

In its amended complaint, plaintiff alleged that defendant Heska intentionally interfered with the agreement between plaintiff and defendant United and that defendants' decision to "destroy distemper product or withhold delivery from United" interfered with existing contracts between plaintiff and its customers. Am. Cpt., dkt. #15, ¶¶ 31-32. On April 28, 2006, plaintiffs filed a motion to stay a decision on this claim pursuant to Fed. R. Civ. P. 56(f), arguing that they had received incomplete discovery from defendants. In an order dated May 5, 2006, Magistrate Judge Crocker denied plaintiff's motion and instructed the parties to bring any further disputes or requests to his attention promptly.

Defendants argue that they are entitled to judgment on plaintiff's intentional interference with existing contracts claim for a number of reasons. First, they contend that this claim is barred by the economic loss doctrine. Second, they argue that plaintiff has

failed to introduce evidence showing that defendant Diamond or defendant Heska interfered with any contract or that defendant Heska interfered with the manufacturing agreement between plaintiff and defendant Diamond. Finally, defendants contend that there is no evidence that they intended to interfere with any of plaintiff's contracts. In response, plaintiff concedes that it "cannot, at this time, provide the full factual basis for its claims against Heska and Diamond." Plt.'s Resp. Br., dkt. #50, at 9. The court's docket shows that plaintiff has not filed any further discovery motions since its Rule 56(f) motion. Summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier to accept its version of events." Schacht v. Wisconsin Department of Corrections, 175 F.3d 497, 504 (7th. Cir. 1999). Because plaintiff has failed to develop its intentional interference claim in any meaningful way, defendants are entitled to summary judgment on this claim. Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999).

2. Intentional misrepresentation

In the January 12 order, I concluded that the economic loss doctrine barred plaintiff from pursuing a tort claim for intentional misrepresentation under Wisconsin law. However, I allowed plaintiff to proceed on an action in contract for intentional misrepresentation after

concluding that this claim would not be barred by the economic loss doctrine under Wisconsin law. I noted further that the only remedy available to plaintiff on this claim is rescission of the agreement. United Vaccines, Inc., 409 F. Supp. 2d at 1094-95. Defendants contend that they are entitled to summary judgment with respect to this claim for two reasons. First, plaintiff has not presented evidence on several of the elements of an intentional misrepresentation claim. Second, plaintiff is not entitled to rescind the manufacturing agreement. Because I agree with defendants that plaintiff waited too long to rescind the manufacturing agreement, I decline to address the parties' arguments concerning the elements of plaintiff's intentional misrepresentation claim.

At the outset, I note that Iowa law governs plaintiff's intentional misrepresentation claim. In the January 12 order, I defined the claim as arising under contract law, as opposed to tort law. Because the claim is a contract claim, the choice of law provision in the manufacturing agreement becomes relevant. That provision states that the "validity, interpretation and performance of this Agreement shall be governed and construed in accordance" with Iowa law. The focus of plaintiff's intentional misrepresentation claim is § 8.1(c) of the agreement, in which defendant Diamond warranted that it had the experience, knowledge, facilities and personnel to manufacture products for plaintiff and to perform its other obligations. Plaintiff contends that it relied on this guarantee in entering into the agreement. Therefore, the claim pertains to the "validity, interpretation and

performance" of the agreement.

Under Iowa law, a party induced by fraud to enter a contract may elect to rescind the contract or affirm the contract and sue for damages. Phipps v. Winneshiek County, 593 N.W.2d 143, 145 (Iowa 1999). If a defrauded party elects rescission, he must do so promptly after learning of the alleged fraud and he must restore or at least offer to restore any benefits that have already accrued to him. Mills County State Bank v. Fisher, 282 N.W.2d 712, 714 (Iowa 1979); Test v. Heaberlin, 118 N.W.2d 73, 75 (Iowa 1962) (holding that party could not seek rescission where he did not seek to disaffirm contract or return property acquired under it).

Defendants argue that even if plaintiff were to prevail on its intentional misrepresentation claim, plaintiff is no longer entitled to rescission because it has already affirmed the manufacturing agreement. The undisputed facts indicate that, rather than returning product that did not contain the proper potency, plaintiff chose to correct the products itself because it had the knowledge and equipment to do so and because it was faster than returning the products to defendant Diamond. By choosing this course of action, plaintiff affirmed the agreement and gave up its right to seek rescission. In addition, the facts indicate that plaintiff was aware of defendant's problems as early as 2003 but did not attempt to cancel the agreement. Instead, plaintiff continued to place orders in 2004 and 2005. Moreover, defendants note that plaintiff never notified defendant Diamond of its

intent to terminate the agreement by providing written notice pursuant to § 7.2 and that plaintiff requested damages in its complaint. Plaintiff does not address these arguments in its response brief. Accordingly, I conclude that defendants are entitled to summary judgment with respect to plaintiff's intentional misrepresentation claim.

3. Breach of warranty

In its amended complaint, plaintiff alleges that defendants "breached both express warranties and implied warranties of merchantability and fitness for a particular purpose by failing to deliver Products in sufficient quantity and potency in a timely manner." Neither side mentions implied warranties of merchantability or implied warranties of fitness for a particular purpose in their briefs. Therefore, I will limit my discussion to express warranties. I presume that by "express warranties" plaintiff is referring to the warranties made by defendant Diamond in § 8.1 of the agreement.

Defendants argue that summary judgment is appropriate on this claim because plaintiff is not entitled to maintain an action for breach of warranty for money damages under the terms of the agreement. They point to § 8.6 of the agreement, which states that the remedies provided in §§ 4.6, 8.3 and 8.4 are the exclusive remedies available to plaintiff "with respect to defective products or any breach of Diamond's limited warranty under section 8.1(a)." Section 4.6 provides that if plaintiff discovers non-conformities with the

products provided by defendant before plaintiff's obligation to pay is triggered, it does not have to pay; if plaintiff discovers the non-conformities after it has paid, § 4.6 directs the parties to § 8.3, which provides that plaintiff may obtain replacements for the non-conforming products, a credit against future purchases and shipping costs or a refund of the purchase price and shipping costs. Finally, § 8.4 states that defendant Diamond will substitute product at no cost to plaintiff in the event of a product recall.

The remedies referred to in § 8.6 are plaintiff's only remedies if defendant Diamond breaches its warranty in § 8.1(a). Therefore, to the extent plaintiff's breach of warranty claim is grounded in a breach of the warranty in § 8.1(a), it cannot maintain an action for monetary damages. This appears to be the extent of plaintiff's breach of warranty claim. Plaintiff appears to concede that § 8.6 applies to its entire claim and does not argue that plaintiff breached the express warranties in §§ 8.1(b) and 8.1(c). Plt.'s Resp. Br., dkt. #50, at 5. Because the parties treat plaintiff's breach of warranty claim as if only one warranty were involved, I conclude that plaintiff has abandoned its claim with respect to any warranties other than § 8.1(a). Therefore, I will grant defendants' motion for summary judgment with respect to plaintiff's breach of warranty claim.

4. Breach of contract

To prevail on a breach of contract claim under Iowa law, plaintiff must prove the

following: "(1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach." Molo Oil v. River City Ford Truck Sales, 578 N.W.2d 222, 224 (Iowa 1998). In its amended complaint, plaintiff alleged that defendants breached the agreement by "failing to have the expertise, facilities and qualified personnel to manufacture and deliver Products in sufficient quantity and potency in a timely manner." However, plaintiff has shifted the focus of its claim in the course of briefing the motions for summary judgment. In responding to defendants' motion, plaintiff contends now that it is entitled to damages for defendant Diamond's *failure to deliver* vaccine product. The undisputed facts indicate that, because of problems in the production process, defendant was able to supply plaintiff with some but not all of the vaccine products it ordered.

Defendants argue that they are entitled to summary judgment with respect to this claim for three reasons. First, plaintiff's pattern of making untimely payments for the products excused defendant's obligation to fill plaintiff's orders. Second, language in the parties' agreement precludes plaintiff from recovering any damages. Third, plaintiff has not sustained any damages because no other company could have manufactured its products.

a. Defendant Diamond's right to suspend performance

Defendants' first argument attacks the third element of a breach of contract claim, the requirement that plaintiff prove that it fulfilled its obligations under the contract. Defendants argue that they are entitled to summary judgment because plaintiff was materially late in paying for vaccine products. They contend that defendant Diamond's failure to deliver was justified under the terms of the agreement in light of plaintiff's repeated failure to pay for vaccine product on time. Section 4.5 of the agreement gave defendant Diamond the option of suspending its performance if plaintiff was "materially late or in material default of its payment obligations."

The agreement does not define "materially late" or "material default." Presumably, if plaintiff were one or two days late with one payment, it would not be in material default. However, it is unclear how many days late plaintiff could be in making payments and how many payments it could be late in making before it crosses the threshold into material default. The parties have made matters more difficult by not specifying how many times plaintiff was late in making payments and how late it was on each occasion.

It is undisputed that plaintiff usually paid invoices between 45 and 60 days after receipt. On several occasions, Randy Frisch, defendant Diamond's controller, sent plaintiff emails or faxes asking when plaintiff would pay its unpaid invoices. Plaintiff would fax Frisch a proposed payment plan to which he would usually agree; however, if he did not, the parties would come up with a plan acceptable to both. Finally, it is undisputed that

defendant Diamond asked plaintiff to pay all outstanding invoices at the end of 2004 before receiving any further deliveries of product and that plaintiff paid the invoices on December 28, 2004.

The parties disagree about the significance of this course of conduct. Defendants argue that plaintiff was "materially late" because it took one and a half to two times longer than allowed under § 4.5 to make payments. Plaintiff suggests that the court should look to the parties' course of performance for guidance in defining "materially late" and "material default." Iowa Code § 544.2208(1) states that

> where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Section 554.2208(2) states that the "express terms of the agreement and any such course of performance . . . shall be construed whenever reasonable as consistent with each other." Plaintiff contends that defendant Diamond's repeated acceptance of payments more than 30 days after the dates of invoices shows that plaintiff was not in material default. However, it is not clear that Iowa's course of performance provision is applicable in this case because there is a question of fact concerning whether defendant Diamond objected to plaintiff's late payments. Randy Frisch inquired about plaintiff's unpaid balances on several occasions and plaintiff threatened to withhold shipment if plaintiff failed to pay its outstanding balances

at the end of 2004. Defendants characterize Frisch's inquiries as objections; plaintiff does not. Although I am inclined to accept defendants' version of events, a reasonable jury could side with either party. Therefore, it would be inappropriate to conclude, as a matter of law, that plaintiff's late payments placed it in "material default" of its obligations. (In addition, because the parties have not provided the dates on which plaintiff paid late and the dates on which defendant Diamond failed to fill plaintiff's orders completely and timely, it is not clear that defendant's incomplete performance occurred after and in response to plaintiff's.)

Alternatively, plaintiff contends that defendant Diamond waived its right to suspend performance by accepting late payments. Iowa Code § 544.2209(4). I find this argument unpersuasive. Section 12.6 of the agreement provides that no "course of dealing between Diamond and [plaintiff] or delay or failure to exercise any rights hereunder shall operate as a waiver of such rights or preclude the exercise of such rights hereunder." Plaintiff argues that this anti-wavier provision may be waived. FS Credit Corp. v. Troy Elevator, Inc., 397 N.W.2d 735, 738-39 (Iowa 1986) ("A contract provision that prohibits waiver of a contractual right may be waived by a party when the anti-waiver provision was included for that party's benefit."). Beyond its citation to FS Credit Corp., however, plaintiff has not developed this argument in any meaningful way. It cites no evidence showing that defendant Diamond waived the anti-waiver provision. In addition, as defendants explain in their reply brief, the facts in FS Credit Corp. are not analogous to the facts in the present

case.

In sum, there are genuine issues of fact that preclude a finding that plaintiff's late payments meet the standard for "material default" in § 4.5 of the agreement.

b. Availability of damages

Defendants argue next that the breach of contract claim must be dismissed because the remedies plaintiff seeks in connection with the claim are unavailable. Defendants argue first that § 8.6 limits the remedies to which plaintiff is entitled. However, this section is inapplicable to plaintiff's breach of contract claim because it applies only to "defective products or any breach of Diamond's limited warranty under section 8.1(a)."

Next, defendants point to § 8.7(b), which bars the parties from obtaining damages for "lost profits, loss of goodwill, or any special, indirect, consequential or incidental damages, arising under any theory of liability." Defendants note correctly that, in the January 12 order, I interpreted § 8.7(b) of the agreement as barring plaintiff from obtaining damages relating to lost sales and customers. Defendants argue that plaintiff is seeking damages for lost sales and customers in connection with its breach of contract claim. Plaintiff maintains that it is seeking "direct" damages under the Uniform Commercial Code. These damages, also known as "benefit of the bargain" damages, are designed to put a non-breaching party in as good a position as he would have been if the parties performed.

Midland Mutual Life Insurance Co. v. Mercy Clinics, Inc., 579 N.W.2d 823, 831 (Iowa 1998).

In its amended complaint, plaintiff alleged that it had suffered damages "in the form of lost sales and lost customers" as a result of defendants' failure to deliver. Am. Cpt., dkt. #15, ¶ 24. Clearly, § 8.7(b) bars recovery of these damages. However, in its request for relief, plaintiff requested rescission of the agreement, compensatory and punitive damages and "any such other relief and costs as allowed by law." Id. at 7. Iowa law allows a buyer to recover damages when a seller wrongfully fails to deliver. These damages are measured as "the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in [§ 554.2715], but less expenses saved in consequence of the seller's breach." Iowa Code § 554.2713(1). Although § 8.7(b) bars recovery of incidental and consequential damages, it does not bar plaintiff from obtaining damages equal to the difference between market price and contract price. Such damages are not the same as lost profits or damages that arise from plaintiff's loss of sales or customers. Plaintiff's damages under the UCC existed as of the moment defendant failed to deliver vaccine product; damages from lost sales or lost profits are the result of transactions that occur after defendant has fulfilled its delivery obligation. The fact that plaintiff's damages under the UCC might be measured as the difference between its retail prices and the contract price does not transform them into damages for lost

profits.

c. Lack of other vaccine producers

Finally, defendants argue that dismissal of plaintiff's breach of contract claim is warranted because plaintiff has admitted that no other company could have produced United's vaccine products. This is not a proper ground for dismissing plaintiff's claim. The fact that plaintiff could not obtain the products defendant failed to provide from another manufacturer does not mean that plaintiff did not incur any damages. Plaintiff incurred damages each day defendant Diamond failed to deliver all of the products it ordered just as defendant Diamond incurred damages each time plaintiff failed to make timely payment for the products. The existence or lack of other suppliers is merely a consideration in determining the proper market price to calculate plaintiff's damages.

Because none of the reasons advanced by defendants justify a grant of summary judgment with respect to plaintiff's breach of contract claim, I will deny their motion with respect to this claim.

D. Plaintiff's Motion for Partial Summary Judgment

To repeat, plaintiff's damages are governed by Iowa Code § 554.2713(1). Therefore, assuming plaintiff is able to prove that defendants breached the contract, it will be necessary

to know the contract price for the vaccine products defendant failed to deliver and the market price for those vaccine products at the time plaintiff learned that defendant would not deliver them. Comment 1 to § 554.2713(1) states that the "general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief."

In its motion for partial summary judgment, plaintiff asks the court to conclude that the market used to determine the market price under § 554.2713(1) is the market into which plaintiff would have sold the vaccines defendant failed to deliver. In essence, plaintiff seeks to substitute its retail prices as the market prices. (It is easy to see how defendants could mistake this request for an attempt on plaintiff's part to recover its lost profits.) Plaintiff's argument begins with the premise that there is no "wholesale" market for vaccine products from which plaintiff could have obtained the vaccine products defendant Diamond failed to deliver. The facts indicate that the market for the vaccines involved in this case contains only manufacturer-sellers and end users. Thus, the only way plaintiff could have obtained cover would have been to purchase the vaccines defendant Diamond failed to deliver from its direct competitors at their retail prices. I agree with plaintiff up to this point. If none of plaintiff's competitors was willing to provide plaintiff with its vaccine products at less than their retail prices, those retail prices are the applicable market prices. Plaintiff assumes that its retail prices are the same as those charged by its competitors and,

on the basis of this assumption, asks the court to conclude that its retail prices are the market prices. However, plaintiff has not introduced, for each vaccine that defendant failed to deliver, the price its competitors charged for that vaccine each time defendant Diamond failed to deliver the quantity plaintiff ordered. Therefore, it would be inappropriate for the court to conclude, as a matter of law, that prices plaintiff charged its customers are the "market price" under § 554.2713(1). Accordingly, plaintiff's motion for partial summary judgment will be denied.

E. Defendant Diamond's Motion for Summary Judgment

Defendant Diamond seeks summary judgment on its claim that plaintiff breached the agreement by failing to pay the full invoice amount for the two batches of C. bot defendant Diamond sent to plaintiff on December 28, 2004. At the outset, I note that the parties do not agree on all of the facts surrounding this transaction. For example, in responding to defendant's proposed findings of fact concerning the C. bot, plaintiff asserted that it did not issue a purchase order for the batches. (Defendant Diamond does not refute this assertion explicitly and does not explain why it sent the batches to plaintiff. However, its contention that plaintiff's refusal to pay the full invoice amount was a breach of the contract would seem to rest on the existence of a purchase order. For its part, plaintiff has not explained why it chose to keep rather than return the batches it never ordered.) According to plaintiff,

defendant Diamond filled all of the open purchase orders for this product when it sent 8,174,496 doses on October 13, 2004. Section 5.1 of the parties' agreement states that plaintiff

> shall submit to Diamond a firm written purchase order or orders specifying the types, quantities, and delivery dates of Products that it desires to purchase . . . . Diamond will review each purchase order within five (5) business days of receipt and either issue its confirmation or its proposed modified delivery date(s) to accommodate Diamond's scheduling requirements. . . . Each purchase order shall be binding on [plaintiff] upon written confirmation by Diamond of, if Diamond has made a proposal for modifications to delivery dates, upon [plaintiff's] written acceptance of such modifications.

It appears that plaintiff's obligation to pay for products is contingent on the parties agreeing to the terms of a written purchase order. Therefore, if plaintiff did not issue a purchase order for the batches, its obligation under the agreement to pay would not be triggered.

Second, the parties dispute how many doses of C. bot were contained in the batches. According to defendant Diamond, the batches contained 14,294,672 doses. Plaintiff contends that defendant's figure is based only on the "toxin titer" of the fluid. (Plaintiff does not explain what "toxin titer" is, however.) Plaintiff states that after performing "mouse potency" testing on the batches, it determined that they contained only 7,332,000 doses. What is undisputed is that, on the basis of its test results, plaintiff cut defendant Diamond a check for $168,636 and told defendant that the check was full payment for the batches. Defendant argues that plaintiff's number of doses must be thrown out because

plaintiff tested the batches more than 60 days after it received them, in contravention of § 4.6, which gives plaintiff 60 days after receipt to test products for non-conformities. However, if there was no purchase order for the batches, would the 60-day limit for testing in § 4.6 apply?

It is unclear whether a purchase order existed for the batches. There are other gaps in the factual record and missing explanations that prevent the court from concluding, as a matter of law, that plaintiff breached the agreement by not paying the full amount of the invoice. Therefore, defendant Diamond's motion for summary judgment will be denied. Each side will have the chance to have its breach of contract heard and decided by a jury.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Diamond Animal Health and Heska Corporation is GRANTED IN PART and DENIED IN PART. The motion is GRANTED with respect to plaintiff United Vaccines' claims of intentional interference with existing contracts, intentional misrepresentation and breach of warranty and DENIED with respect to plaintiff's breach of contract claim;

2. Plaintiff's motion for partial summary judgment is DENIED; and

3. Defendant Diamond Animal Health's motion for summary judgment with respect

to its breach of contract counterclaim concerning the batches of C. bot. shipped to plaintiff on December 28, 2004 is DENIED.

Entered this 12th day of June, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge